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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 415.

In the Matter of

VAN SWERINGEN CORPORATION, Debtor,

and

THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

MEYER ABRAMS, HARRY J. MYERSON
and FANNIE B. STERN,
Executrix of the Estate of Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondent.

On Petition for Writ of Certiorari
To the United States Circuit Court of Appeals,
For the Sixth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

QUESTION PRESENTED.

The single substantial issue before the Special Master and the District Court was

> "How much compensation should be allowed to petitioners?"

This was a question of fact—a problem of the evaluation of services rendered or claimed to have been rendered.

The issue in the Circuit Court of Appeals was, and the issue here is

> "Should this Court disturb the concurrent findings made below?"

I. OPINIONS OF THE COURTS BELOW.

A. THE UNITED STATES CIRCUIT COURT OF APPEALS.

The one-page opinion of the United States Circuit Court of Appeals is reported at 136 Fed. (2nd) 537. It constitutes the best brief that can be written on behalf of respondent and accordingly we quote it here in full:

> "In the proceedings for corporate reorganization involved herein, forty applications for compensation and expense allowance were made in sums totalling $803,944.48 for compensation and $41,929.99 for expense allowance. The Special Master reported his recommendation of allowance to the various applicants of the total sum of $373,178.53 as compensation and $36,014.74 as expense reimbursement.
>
> "The District Judge overruled all objections and exceptions to the report of the Special Master, confirmed the report, and ordered the allowance of compensation and expenses as recommended by the Master.
>
> "The appellant attorneys, Abrams, Myerson and Stern, have appealed from the order of the District Court. Their claim was for $172,200 as compensation and $6,163.41 as expenses.
>
> "The Master recommended, and the District Judge allowed them $18,000 as fees and $2,500 for expenses. The intervening Securities and Exchange Commission had recommended the allowance to the appellant attorneys of $18,000 as compensation and $5,339.51 for expenses.
>
> "(1) It is settled law, repeatedly asserted in this circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co. (Continental Casualty Company v. Harold H. Barnett, Trustee in Bankruptcy)*, 6 Cir., 134 F. 2d 725, decided April 8, 1943; *Kowalsky v. American Employers Ins. Co.*, 6 Cir., 90 F. 2d 476, 480.
>
> "(2) Upon consideration of the record, briefs, and oral argument, no error of law affecting the determination of this controversy on appeal has been found,

and there is abundant evidence to support the concurrent findings of the Master and the District Judge with respect to the fee-compensation and expense allowance to appellants.

"The judgment of the District Court is affirmed."

This judgment refusing to disturb the findings of fact made below was well justified; for, as we shall show hereinafter, every finding in the trial court was amply supported by adequate evidence, so that no ground whatever exists for a disturbance of the findings made.

B. THE UNITED STATES DISTRICT COURT.

The District Court's opinion is not reported, but it appears in the printed record, Volume 1, pages 205 to 207 (not page 705 as is stated at page 8 of petitioner's brief).

II. COMMENTS ON STATEMENT OF FACTS.

According to petitioners, they have been the victims of a malignant combination of a "biased" Special Master, of a District Judge who "did not examine the evidence," and of a Circuit Court of Appeals which ignored its "duty." ("Everybody's out of step except my Michael.") The petitioners' brief is so thoroughly interlarded with charges of this kind that to relate the details of the facts covering each and every such item of indictment so as to show the distortions indulged in by petitioners would require a brief nearly as large as the printed record, and far beyond what good practice dictates in opposing petitions for certiorari. Accordingly we shall confine this brief to showing, as succinctly as possible, that every one of these findings of fact was amply supported by adequate evidence.

A. THE SPECIAL MASTER'S FINDINGS.

Petitioners say that the petition for the allowance of compensation was divided into two parts (Brief, p. 9), namely,

(a) services relating to administrative matters, interrelationship of parent and subsidiary and their dominant officers, segregation of funds, and reorganization plans, and

(b) services concerning elimination of claims in excess of $19,000,000.,

and that they were allowed $18,000. for services performed under (b), which they desire to have left undisturbed, and that their application for compensation for services under (a) was wholly denied. (Brief, pp. 9-10.) Reference to the record does not sustain this division of services as one which was made by petitioners in their application for fees or by the Special Master or the court in the allowance made.

It is a fact that petitioners set forth as one main heading in the summary of their services given in their application (R. I, 5)

"PLANS OF REORGANIZATION AND MATTERS CONNECTED WITH ADMINISTRATION OF ESTATE"

under which are a number of subheadings, and that later on in their application they set forth another main heading (R. I, 16)

"ELIMINATION OF CLAIMS"

under which are also a number of subheadings.

However, at the hearing before the Special Master, petitioners, in answer to a question from the Special Master, adopted (R. I, 161) the classification set forth in the summary part of their application under the heading "RESULTS ACHIEVED" (R. I, 23); and that classification was used throughout the subsequent proceedings before the Special Master, the proceedings in the District Court, and the proceedings in the Circuit Court of Appeals. It will be used in this brief also.

This classification was adopted, and petitioners' attitude toward the entire record of reorganization was established in the hearing before the Special Master, as appears at R. I, page 161 in the following dialogue:

> "The Special Master: Mr. Abrams, is it fair to state that the items on page 26, the results achieved are all summarized under the heading 'Results achieved' on page 26?
>
> The Witness: Correct.
>
> The Special Master: And you are satisfied that whatever the record of the Special Master and the District Courts show as to the various items represent the true facts in connection therewith?
>
> The Witness: I am." (R. I, 161.)

The prayer of the application was for one lump sum of $172,200. "as reasonable compensation for the services performed by your petitioners for the benefit of the estate of the Subsidiary Debtor, The Cleveland Terminals Building Company" (R. I, 25), with no attempt to allocate the claim or any part of the claim to any particular services performed, unless the discussion in paragraph 8 of the application (R. I, 23 and 24) of the percentage relationship of the total fee claimed to the amount of the claims alleged to have been eliminated is an indication that the petitioners intended to stand on the position that their fee should be based on the value of their services in eliminating claims, with the other work done thrown in for good measure, without any serious claim for separate compensation with reference to such other work.

The Special Master's recommendation with reference to allowance is simply for a lump sum as compensation for all of the services referred to in petitioners' application, which the Master found, as a matter of fact, to have contributed anything of value to the estate. His recommendation reads in full (R. II, p. 65) as follows:

"RECOMMENDATION

Allowance is respectfully recommended as follows:

Compensation	$18,000.00
Expenses	
(Reimbursement re employment of Laubscher and Smith)	$ 500.00
(Reimbursement of petitioners' expenses)	$ 2,000.00
Total	$ 2,500.00

ALLOCATION

General Estate	66⅔ percent
Terminal Tower Lease	33⅓ percent"

B. COMMENTS OF THE SECURITIES AND EXCHANGE COMMISSION OF THE UNITED STATES.

The Commission's comment on the petitioners' application is set forth in full in the Appendix of this brief. This shows a recommended allowance of $6,000. for services in connection with plans of reorganization and administrative matters. (See third paragraph of Comments in Appendix.) The total recommendation is for $18,000. The balance of $12,000. is for services in connection with the elimination of claims. (See fourth paragraph of Comments in Appendix.) It also recommends that the $6,000. be charged against the Terminal Tower Building and funds derived therefrom and that the $12,000. be charged against free funds of the Subsidiary Debtor.

These comments of the Commission were in the Special Master's report "incorporated herein, as though fully rewritten and set forth." (R. II, p. 64.) From the specific findings of the Special Master as discussed below, it is obvious that he reached the same result as did the Commission—that is, an allowance of $6,000. for services in connection with plans, all to be allocated to the Tower, and

a further allowance of $12,000. for services in eliminating claims, to be allocated to the general estate.

C. THE DECISION OF THE DISTRICT COURT.

Judge Jones' opinion is set forth at Record I, pp. 205-207 and his order appears at Record I, pp. 208-213. The order states that the Special Master's Report and the notices given concerning the same "are hereby approved, adopted and confirmed as the notices, findings and orders of this Court." (R. I, 208.)

The last page of the Special Master's report filed May 23, 1942, consisted of a notice that the same "will come on for hearing before the Honorable Judges on Saturday, June 13, 1942, at 10 o'clock A. M., or as soon thereafter as the court may conveniently reach the same." (R. II, 69.) On June 1, 1942 the District Judge entered an order specifying the parties to whom should be given notice of the filing of any exceptions to the report of the Special Master. (R. II, 70.) There followed a paragraph postponing hearings to "a time to be hereinafter fixed by the court and noticed by the clerk to the interested parties." Full opportunity was given for the filing of briefs and reply briefs and extensions of time therefor were freely granted. Petitioners' objections and brief were filed on June 5, 1942, and although the brief requested an oral hearing, it contained no intimation of a desire to offer additional evidence. No proffer of evidence was made by anyone, and after a long interval appeared to indicate that all arguments had been made in writing and that no additional evidence was to be forthcoming, the Court on August 21, 1942, announced its decision. (R. I, 207.)

III. SUMMARY OF ARGUMENT.

To sum up our argument, we point out that the District Court's opinion and journal entry both contradict the petitioners' claim that the District Judge failed to examine the evidence.

As to the merits of petitioners' claims that the allowance made was grossly inadequate, we point out that petitioners filed but one application and their prayer was for one lump sum for all of their services rendered, that the court made but one allowance thereon, that this allowance covered all of the services that the court considered compensable and that included in those compensable services were not only the matters of elimination of claims but also services rendered in connection with the plans and with some parts of the administration of the estate.

The single amount claimed as the value of all of petitioners' services was originally placed by them at the modest sum of $172,200. (R. I, 25.) The District Court's allowance of $18,000 was for *all* services as we have shown, and not merely for eliminating claims, as petitioners now say.

Taking up the services in detail, petitioners' points are answered as follows:

Independent supervision. Petitioners may have been instrumental in obtaining appointment of Trustees for the parent corporation but not for the subsidiary. Such services are not compensable out of the estate of the subsidiary. Supervisors for the subsidiary were appointed later but this was on the Special Master's own motion for the appointment of Trustees for Subsidiary Debtor and not because of anything that petitioners had done. Services under this heading were therefore not compensable.

Salaries reduced. No compensation is now asked here by petitioners, who apparently recognize that this matter

was one definitely cast upon the Court by Section 77B(c) rather than upon counsel.

Sequestration of Tower Funds. Because of the Ohio rule (*Hutchinson vs. Straub,* 64 O. S. 413) that the institution of the proceeding itself works a segregation, services in this category were not compensable. The net result of all the agitation about sequestration was to remove from the already segregated funds $81,451.77 which had accumulated prior to the commencement of the proceeding.

Chamber of Commerce Lease. Actually this lease expired by lapse of the stated term. No benefits were derived from the complaints about it.

1937 Plan Rejected. Due credit for this rejection must be given to three groups: the Bailey Committee representing $1,500,000. of Tower Bonds; the Dunham Committee representing $1,000,000. of such Bonds; and the Gochenour Group representing at most $85,000. of such Bonds. The Special Master did not state that petitioners' claims in this respect were "untrue" but instead said that they were "not a statement of the whole truth." The Special Master's express adoption of the Securities and Exchange Commission's recommendations requires recognition that one-third of his allowance to petitioners was for services in the matter of the rejection of the 1937 Plan and related matters other than elimination of claims.

Petitioners did not object to the 1938 Plan and the defeat of the same was caused by the objections of the Securities and Exchange Commission.

The 1940 Plan was adopted. It is true that petitioners permitted the Subsidiary Debtor in its letter urging acceptance of this Plan to say that it had the support of petitioners' clients. The record does not show that petitions made any other contribution to the 1940 Plan. Petitioners' claim of a close resemblance between their sug-

gested amendments to the 1937 Plan, and the adopted framework of the 1940 Plan, fails upon close analysis.

Elimination of Claims. The Securities and Exchange Commission's recommendation, the Special Master's report and the District Judge's order are all tied together by the Special Master's adoption of the Commission's "comment" upon petitioners' application, and the District Court's adoption of the Special Master's report. These tie-ups definitely indicate an allowance of $12,000. for elimination of claims, chiefly for the partially successful attack upon the Morgan claim, but also including any compensable services with reference to other claims. Petitioners' brief here complains of the alleged failure to make any allowance in respect of the Van Sweringen Corporation's claim. Petitioners have distorted and misquoted the Special Master's report in several respects so as to give it a color of prejudice which, in fact, it does not have. Petitioners attacked the Van Sweringen Corporation's entire cause of action on grounds which, if established, would have defeated it entirely; and their attack on the interest was only incidental. Other counsel attacked the interest only, on grounds which went to that point alone, and succeeded in establishing these grounds. The Special Master did not find petitioners' services were non-compensable but said they were of "negligible value" in contributing to the ultimate result. The Terminal Building Company claim fell in the same category.

Expenses. Many items were not supported by vouchers, and others are urged in contravention of the order of the Circuit Court of Appeals in *Gochenour vs. Morgan.* Many others were incurred without authority from the Court, just as were most of the services attempted to be rendered by petitioners herein—volunteered without the basis of any responsibility placed upon petitioners with reference to them by Court order or otherwise.

Procedure. Petitioners made no proffer of evidence. They object to remandment. They had ample opportunity to put all of their claims and arguments before the District Judge in writing; and they did so. In substance, the requirements of F. R. C. P. 53 (e)(2) were fully met.

Petitioners were afforded every opportunity to file briefs and present all their points and claims, but they made no proffer of additional evidence, they gave no statement of what additional proof, if any, they desired to make, and none of their evidence was excluded.

IV. ARGUMENT.

A. THE DISTRICT JUDGE DID NOT FAIL TO EXAMINE THE EVIDENCE.

Petitioners charge that the District Judge "refused to examine the evidence." (Brief, pages 5, 16, and 20.) On the contrary the opinion affirmatively shows (R. I, 205) that the Judge examined the applications, the Master's report, the exceptions, the reasonableness of the Master's allowances, the benefits to the estate and the contributions to the confirmation of the Plan, saying (R. I, 205):

> "From an examination of the *applications* and the *Master's report,* and a consideration of the *exceptions* to his recommendations, it seems to me that the Master has endeavored fairly to appraise the various services with due regard to their *reasonableness,* their *benefit* to the administration of the estate, and to their *contribution* to the confirmation of the plan." (Emphasis ours.)

F. R. C. P. 52 (a) provides that "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court." Accordingly, it was unnecessary for the judge to make separate findings. In a somewhat similar situation, the Judge in *Joyce, Inc. vs. Fern Shoe Co., et al.* (U. S. D. C., S. D. Cal., Cen. Div. 1940) 32 F. Supp. 401, said at p. 404:

> "But I believe that the spirit of the new rules which dispenses even with the necessity of findings by the court when we agree with the master's conclusions, Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, calls for a full statement of our views only as to the matters on which we disagree."

Later in the opinion in the instant case the Judge states that a detailed opinion is unnecessary (R. I, 206), saying "It will not be possible to analyze the voluminous charges and set down my comment and appraisals." Far from indicating a failure to consider the problems presented, this, on the contrary, shows that the Judge had made an analysis and had in mind his "comment and appraisals." He then continued,

> "* * *; suffice it to say, that I have given what seems to me to be fair consideration to the claims and exceptions of the various parties and persons." (R. I, 206.)

The opinion concludes with a paragraph making reference to the familiar principle that a tribunal which has seen and heard the parties and the witnesses and had the first hand opportunity to be close to the situation has a presumption in favor of its results which should be given due weight where the reviewer is in some doubt from the cold written record and might possibly have varied the results somewhat, if he had been acting in the first instance himself. Surely this wise adherence to a familiar principle of judicial decision in reviewing the Master's findings is not to be interpreted as a refusal to examine the evidence.

Furthermore, it is elementary that the court speaks through its Journal and in the first paragraph of the Journal (R. I, 208) the court says that the cause came on upon the report of the Special Master, "upon the various objections and exceptions thereto and *upon the evidence*, and upon consideration thereof, it is hereby ordered," etc. (Emphasis ours). This again is an affirmative assertion that the court did examine the record.

B. THE ALLOWANCE WAS ADEQUATE IF NOT EXCESSIVE.

a. Rules of Law Applicable.

1. "Unless clearly erroneous" the Master's findings of fact were required to be accepted by the District Court F. R. C. P. 53 (e)(2),* and by No. 47** of the General Orders in Bankruptcy. This test requires, in order to upset a Master's finding of fact, a clear demonstration that it is wrong. This rule must be constantly borne in mind while considering each claim of service rendered, and the action of the District Court with reference to the same.

These two rules of practice prescribed by the Supreme Court merely apply the general principle that is consistently followed in this Court (*Crawford vs. Neal*, 144 U. S. 585, 596, 601; *Davis vs. Schwartz*, 155 U. S. 631, 636), and in all of the subordinate Federal Courts including the United States Circuit Court of Apeals for the Sixth Circuit. (*Continental Casualty Company vs. Barnett*, 134 Fed. (2nd), 725; and *Kowalsky vs. American Employers' Ins. Co.*, 1937, 90 Fed. (2nd), 476, 480, and cases therein cited.)

2. The Court before which legal services are rendered, in fixing the compensation to be paid therefor, may give weight to facts within the Court's own observation and knowledge. (*In re New York Investors, Inc.*, 130 Fed. (2nd) 90, 92; *Cooke vs. Bowersock et al.*, 122 Fed. (2nd) 977, 981; *Silver et al. vs. Scullin Steel Co.*, 98 Fed. (2nd) 503; 7

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* "In an action to be tried without a jury the Court shall accept the master's findings of fact unless clearly erroneous. * * *." F. R. C. P. 53 (e)(2).

** "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. * * *" This is made applicable in corporate reorganizations, by General Order in Bankruptcy No. 52 (2).

C. J. S. 1093; *Tracy et al. vs. Spitzer-Rorick Trust & Savings Bank,* 12 Fed. (2nd) 755; *Farmers, etc., Co. et al. vs. McClure,* 78 Fed. 209, 210; *Associated Towel & Linen Supply Co.,* 7 Fed. Supp. 699.)

3. Compensation to volunteers, not the appointees of the Court, is strictly limited. It will be noted that petitioners were not the appointees of the Court and that Messrs. Fogg and Leckie, Supervisors (who, by direction of the Court, acted as their own counsel) and also Special Counsel who acted in particular cases at the direction of the Court, are castigated in petitioners' brief wherever the petitioners unsuccessfully sought compensation for services rendered in matters where the Court did allow compensation to its own appointees for services rendered in connection with the same matters.

It is the trend of recent cases to refuse compensation out of the estate for services in corporate reorganization proceedings, to attorneys who, in a sense, are volunteers, not the appointees of the Court,—unless the approval of the Court was first obtained for the rendition of such services at the expense of the estate.

The rule has been receiving increasing recognition in recent cases that no compensation should be allowed to attorneys who are not appointees of the Court, unless the following elements conjoin,—viz:

1—They are beneficial to the estate;

2—The Trustee refused to act; and

3—Formal authorization was procured from the court in advance for authority to proceed.

To this effect see:

In re New York Investors, Inc., 130 F. (2d) 90, syllabus 1;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599;

In re Progress Lektro Shave Corporation, 117 F. (2d) 602;

In re Postal Telegraph & Cable Corporation, 119 F. (2d) 861;

In re Eureka Upholstering Co., 48 F. (2d) 95.

4. Allowances are discretionary with the Court.

Whether any fees are allowed, and the amount, if allowed, are within the sound discretion of the Court before which the alleged services were rendered, and the Court's judgment thereon will not be overruled unless clearly contrary to, or unsupported by, the evidence. (*Mercantile-Commerce Bank & Trust Co. et al. vs. Southeast Arkansas Levee Dist. et al.,* 106 Fed. (2nd) 966, 972; *Campbell et al. vs. Green,* 112 Fed. (2nd) 143, 144; *Forbes vs. American Mail Line,* 115 Fed. (2nd) 196; *Palmer vs. Paramount Pictures Inc.,* 85 Fed. (2nd) 588; *Silver et al. vs. Scullin Steel Co.,* 98 Fed. (2nd) 503.)

Petitioner to be entitled to any allowance for services must bring himself within the purview either of Section 642 or of Section 643, Title 11, U. S. C. A. (Sections 242 and 243 of the Federal Bankruptcy Act.)

In both of these sections the allowance is discretionary.

The pertinent portion of Section 642 reads:

> "The Judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with the plan approved by the Judge, whether or not accepted by creditors and stockholders or finally confirmed by the Judge—
>
> "(1) By * * * committees or representatives of creditors or stockholders; * * *
>
> "(3) By the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

Note that the compensation *may be allowed,* either in connection with the *administration* of an estate or in connection with a *plan approved* by the Judge.

Section 643 is somewhat more comprehensive in scope and permits the allowance of such compensation or reimbursement for services

> "in connection with the submission * * * of suggestions for a plan, or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances the Judge shall give consideration only to the services which contributed to the plan confirmed, or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, * * *."

Having these general rules in mind we may now proceed to examine the particular services rendered, and the claims in connection therewith, to see whether the findings below are supported by evidence. We submit that the examination discloses that each finding was amply supported by adequate evidence.

b. Discussion of Specific Services.

1. *Independent supervision.* The Special Master found:

> "Petitioners herein contributed nothing and participated in no manner in the matter of the appointment of Supervisors for Subsidiary Debtor." (R. I, page 181.)

This finding of fact must stand "unless clearly erroneous." It is supported not only by the Special Master's personal knowledge of the details of the administration throughout the period of the reorganization and by the evidence brought before the Special Master upon the applications of other counsel who participated in the administrative details, but also by the facts indicated in

the following documents which were a part of the record before the Special Master, to-wit:

1. The District Judge's memorandum of October 15, 1936 directing the Special Master to look into the problem of leaving the Debtor and Subsidiary Debtor in possession and into other problems. (R. I, 180-217.)

2. The Special Master's order for meeting of creditors to consider the problem of leaving the Debtor and Subsidiary Debtor in possession and other problems. (R. I, 218.)

3. The Special Master's report of December 31, 1936 recommending that The Cleveland Terminals Building Company be continued in possession without the appointment of Trustees. (R. I, 224-226.)

4. The Special Master's report of December 31, 1936 recommending against continuing Van Sweringen Corporation in possession and recommending the appointment of Trustees therefor. (R. I, 227-228.)

5. The Special Master's report of January 26, 1938 recommending the appointment of Trustees for The Cleveland Terminals Building Company at that time. (R. I, 232.)

6. The Judge's modification of the action recommended, by appointing Supervisors (R. I, 236) for Subsidiary Debtor instead of Trustees.

7. The applications for compensation in respect of this matter, filed by various other counsel, and the evidence adduced in support thereof.

Thus there is ample evidence to sustain the Special Master's finding that there was no benefit to the estate here under discussion (Subsidiary Debtor's estate); and certainly the finding cannot be said to be "clearly erroneous."

2. *Salaries reduced.* Petitioners no longer make any claim of being the prime mover toward this result (Section 77 B (c) enjoined this duty of investigating and fixing salaries upon the District Judge and he performed it) so that petitioners' abandonment of this claim seems well advised.

3. *Segregation of Tower funds.* The Special Master found:

> "From all of the foregoing it is respectfully submitted that the petitioners herein performed no services in the respect alleged. Their statement to the effect that their services benefited the estate in this regard are not in accordance with the facts of the case and (that) they are entitled to no compensation therefor." (R. I, 186.)

This finding of fact was supported by the following documents in the record before the Special Master:

1. Gochenour's application to intervene, and proposed petition of intervener including a suggestion for segregation of Tower funds, filed March 13, 1937. (R. I, 239.)

2. The application of Gochenour and others, being a duplicate of No. 1 except for the inclusion of other applicants, dated March 20, 1937. (R. I, 239.)

3. The brief of Subsidiary Debtor opposing the foregoing applications to intervene and setting forth that Subsidiary Debtor had long before instituted and was still continuing the practice of segregating all funds collected by it from the Terminal Tower Building. (R. I, 243.)

4. The Special Master's findings and orders denying intervention, dated June 4, 1937. (R. I, 243-246.)

5. The petition of the Trustee of the Tower Bond Issue to intervene filed September 30, 1938. (R. I, 314, Item 5.)

6. The petition for segregation attached to No. 5 above dated September 30, 1938. (R. I, 247-248.)

7. The Special Master's notice of hearing upon the same. (R. I, 248.)

8. Transcript of the hearing on the same held on October 21, 1938 and showing that petitioners did not attend and were not represented at said meeting. (R. I, 248.)

9. The objections of Subsidiary Debtor filed on November 21, 1938. (R. I, 185 and 249.)

10. Transcript of the second hearing, occurring November 23, 1938, at which one of the petitioners attended but did not participate in the proceedings or the examination of witnesses. (R. I, 185 and 248.)

11. The answer of J. P. Morgan & Company filed December 2, 1938. (R. I, 185 and 249.)

12. Transcript of testimony at third hearing occurring December 2, 1938, at which petitioners did not attend and were not represented. (R. I, 185 and 249.)

13. Various briefs filed by Central National Bank, Indenture Trustee, by Subsidiary Debtor, by J. P. Morgan & Company and by the New York Terminal Tower Bondholders Committee. (R. I, 185.)

14. The findings and orders of the Special Master dated March 14, 1939. (R. I, 249-251.)

15. The applications for compensation in reference to segregation of Tower funds, filed by the Trustee of the Tower Bond Issue and its own counsel, and the evidence adduced in support thereof.

16. The testimony of Mr. Stern, who was appellants' local counsel, to the effect that he took no part "in the work of causing the sequestration of the Tower funds." (R. I, 139.)

In the face of all this evidence, this finding of fact by the Master is certainly not shown to be "clearly erroneous"; and therefore it must stand.

4. *The Chamber of Commerce Lease.* This lease was neither rejected nor cancelled. (R. I, page 187.) It expired by lapse of time, and the tenant occupied the premises until the expiration of the stated term. (R. I, page 187.) The tenant failed to exercise its option of renewal. The Special Master found:

"Petitioners herein in no way contributed or participated in the matter of the disposition of the Chamber of Commerce lease question in these proceedings, and are entitled to no compensation in connection therewith." (R. I, 187.)

Documents in the record before the Special Master which supported this finding were:

1. The Adams Group petition to intervene dated November 10, 1936. (R. I, 220-221.)

2. The Special Master's order allowing such intervention dated November 12, 1936. (R. I, 222.)

3. The application of the Adams Group requesting rejection of the Chamber of Commerce lease filed March 8, 1937. (R. I, 237 and 238.)

4. The proposed intervening petition of A. B. Gochenour, *et al.*, including a similar prayer for cancellation of the Chamber of Commerce lease filed March 13, 1937, and again March 20, 1937. (R. I, 239-243.)

5. The Special Master's findings and orders upon the last named petition to intervene dated June 4, 1937. (R. I, 243-246.)

6. The applications for compensation in respect of this matter, filed by counsel for the Subsidiary Debtor, by counsel for the Adams Group, and by other counsel, and the evidence adduced in support thereof.

Here again petitioners utterly fail to show that the Special Master's finding is "clearly erroneous."

5. *Rejection of 1937 and 1938 Plans.* The Special Master found that:

> "The statement, therefore, that because of petitioners' efforts 'the unfair plans of Debtor and Subsidiary Debtor were rejected' is not a statement of the whole truth." (R. I, page 188.)

The Master's report recognizes (R. I, 187-188) that petitioners, representing at most $85,000. of bonds, objected to the 1937 Plan and points out that the Bailey Committee of Terminal Tower Bondholders representing $1,500,000. of Tower Bonds and the Dunham Committee representing over $1,000,000. of Tower Bonds also objected. The Special Master's adoption and incorporation (R. II, 64) of the

comments of the Securities and Exchange Commission on the petitioners' fees clearly shows that he allowed $6,000. of fees in respect of administrative matters and plans of reorganization and charged the same to the Tower Fund. The petitioners' assertion, therefore, that he called their claim in this respect "untrue" and that he allowed them nothing except for elimination of claims is completely overthrown by the written record.

On the matter of the 1938 Plan petitioners filed no objections (R. I, 188), although the 1938 Plan failed to adopt any of petitioners' suggestions for a Tower Plan. This plan was accepted by the Creditors but failed of confirmation by the Court because of the objections of the Securities and Exchange Commission. (R. I, 188 and R. I, 280-286.)

The Special Master had before him the applications for compensation in respect of these plans and their failure (particularly on the objections to the 1937 Plan filed by counsel for the said Bailey Committee and Dunham Committee) and the evidence adduced in support thereof. Here it certainly cannot be said that the Special Master's finding was "clearly erroneous" in pointing out that applicants played only a minor role in defeating the 1937 Plan, and none whatever in the downfall of the 1938 Plan.

6. *Adoption of the 1940 Plan.* The Special Master says unequivocably in his finding:

> "The record shows no contributions offered by petitioners to the Plan of Reorganization which was adopted." (R. I, page 188.)

It is true that petitioners permitted the Subsidiary Debtor to say in a letter to bondholders that said Plan

> "has the support of the following bondholders groups"

naming four committees and adding "A. B. Gochenour, *et al.*" (R. I, page 317); but petitioners' claim that their objections to the original Plan of Reorganization were the

basis of the Plan ultimately adopted is entirely unwarranted. Petitioners claim to have suggested the valuation of Three Million Dollars ($3,000,000.00) that was ultimately adopted for the Tower; but reference to their 1937 objections and proposed amendments (R. I, pages 94 to 99, 272 to 275) shows that they suggested no valuation whatever. They merely suggested a reduction of the bond issue to Three Million Dollars ($3,000,000.00); but the same reference shows that they suggested no valuation figure at all.

Petitioners suggested that the bondholders get all of the stock (R. I, page 98); but the Plan gives them only seventy per cent (70%) of it. (See 1940 Plan, page 13.)

Petitioners claimed to have suggested in 1937, an "allowance of a general claim for the balance of the Three Million Dollars ($3,000,000.00) plus accrued interest," whereas they actually (R. I, page 198) named no amount whatever.

The obvious suggestions of appraisal, of Court approval of charter, by-laws and personnel of the reorganized company, and of preservation of a right of accounting against officers and directors were items which might and probably should have appeared in any Plan; and the slight resemblance of the 1940 Plan to the 1937 Plan in these respects constitutes petitioners' only possible claim of contribution to the 1940 Plan.

The Special Master had before him the applications of other counsel in respect of preparing and contributing to the Plan eventually adopted, and the evidence produced in support thereof. It must have been clear to him that the present petitioners, like the applicant in the *Schulte Retail Stores Corporation* case, C. C. H. Bankruptcy Service, paragraph 53437 (S. D. N. Y., 1941) were not "instrumental" in bringing about the Plan, but merely played the role "of only a critical spectator *ab extra* of the submission by others of proposed plans."

Certainly petitioners have not shown that the Master's finding that "the record shows no contributions offered by petitioners to the Plan of Reorganization which was adopted" was "clearly erroneous"; and unless petitioners bear that burden, the Special Master and the District Court should be sustained.

7. *Elimination of Claims.* In the Circuit Court of Appeals, petitioners were apparently satisfied with the full credit awarded to them for contesting the Morgan claim, as above mentioned; and their brief made no complaint about the denial of compensation to them in connection with claims presented by Midamerica Corporation.

In connection, however, with the Court's disallowance of interest on the claims of Van Sweringen Corporation and The Terminal Building Company, the Special Master's finding of fact was that:

> "Any contribution made by petitioners as to said item was of negligible value." (R. I, page 190.)

Petitioners' efforts had been directed chiefly at issues which, if successful, would have defeated each claim entirely. Of course the interest would have been defeated with the principal. These efforts were unsuccessful. Other counsel made their attack directly and solely upon the issues affecting interest only; and the interest was disallowed. Bearing in mind that allowances (particularly to volunteers) are discretionary with the Court, and bearing in mind the circumstances mentioned, certainly it cannot be said that the finding was "clearly erroneous"; and unless so, it must be sustained. (F. R. C. P. 53 (e) (2) and General Order No. 47.)

8. *Expenses.* In *Gochenour vs. Morgan, et al.,* 111 F. 2d 378, the Circuit Court of Appeals apportioned 80% of the costs to Gochenour and 20% to Morgan. (R. I, 191.) Gochenour now seeks to throw his 80% back on the estate, by having them allowed in this proceeding. (R. I, 191.) This should not be allowed.

The report also culled out items for which vouchers were not presented; and yet afterwards in the District Court petitioners did not even make a proffer of evidence, to show the vouchers that would have supported their claims.

Many of their expenses were incurred in the same way as their services were attempted to be enforced upon the estate and the Court, and are entitled to no more recognition than the alleged services.

There is no showing that the Master's findings of fact on the issue of expenses were "clearly erroneous." On the contrary, the record shows them clearly correct, and they should be sustained.

C. NO HEARING WAS NECESSARY WHERE NO EVIDENCE WAS OFFERED.

Finally, it remains to deal with petitioners' contention that they were not given a hearing in the District Court as required by F. R. C. P. Rule 53 (e)(2). This requirement is not for an "oral hearing," which may be dispensed with as provided in rule 78 (see *post*), but only for a "hearing."

When the Special Master's report was filed on May 23, 1942, five and one-half months had elapsed after more than a week of testimony on the subject of fees. During this period ample opportunity had been given for the filing of all the briefs the petitioners wished for.

Attached to the report was a notice of a hearing to be held before the District Judge on June 13, 1942. (R. II, 69.) On June 1, 1942 the District Judge entered an order (R. II, 70) postponing the hearing indefinitely and stating that the clerk would give notice later. No such notice was ever given, but during this period, and afterward, petitioners' objections and exceptions were filed and ample opportunity was given—and availed of—for the filing of briefs and reply briefs. Petitioners had every opportunity to make every argument they desired and to make those arguments

in the measured terms of the written thesis rather than in the hasty phrases of oral debate. Petitioners now complain that they wished to present oral evidence; but during all that time there was no proffer of evidence to be submitted, and no statement of what petitioners expected that such evidence would prove. Such proffer and statement are always conditions of the right to a rehearing or a new trial on the ground of exclusion of evidence that should have been admitted. The general rule is stated in all the digests. See 2 *R. C. L.* 78; 4 *C. J. S.* 580; 3 *Am. Jur.* 97. The same principle has now been adopted as a rule for procedure in federal courts (see F. R. C. P. 43 (c))* and as such was binding upon petitioners in this case.

Moreover F. R. C. P. 78 provides in part:

> "To expedite its business, the court may make *provision* by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." (Emphasis ours.)

This "provision" the District Court has made by a rule which is quoted in every notice of the filing of a Special Master's report and which will be found in the record of the notice of every report filed herein by the Special Master. This printed or mimeographed rule in such notice reads as follows:

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*"RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

"Briefs in support of objections should be served with the objections and the adverse party is allowed ten (10) days to serve a reply brief.

"No oral argument will be heard unless requested by the Court."

This is exactly the practice which was followed in the instant case. The Special Master's recommendation was equivalent to a motion under Rule 53 (e) (2). Notice was given under the same rule and oral hearing was dispensed with, in the absence of a proffer of evidence, under Rule 78, after the filing of briefs.

As respects the alleged errors in the confirmation of the Master's report by the Court, it is claimed that under Rule 53(e)(2), an interested party is entitled both to an oral hearing and to introduce new evidence when a Court is considering the confirmation of a report to him of a Master, and of objections to the Master's findings.

Rule 53(e)(2) reads as follows:

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

It is to be noted that, upon the face of this rule, there is no suggestion of any absolute right to introduce new evidence before the court. The language is that the court "*may* receive further evidence."

And while there is mention of a "hearing," this does not necessarily imply an oral hearing.

Further it is to be noted that both under this Rule and under General Order No. 47, the presumption is in favor of the Master's findings. The Court "shall accept the Master's findings unless clearly erroneous."

Obviously, the point is raised as a technicality only. The fact is that petitioners had a hearing, although not an oral one.

D. CONCLUSION.

Allowances are discretionary with the Court. Each finding was amply supported by adequate evidence. No proffer of additional evidence was made, and petitioners had every opportunity that an oral hearing would have afforded, and in some respects a better one. There is no showing that any finding was "clearly erroneous" but, on the contrary, examination of the record amply supports the findings that were made. The allowance to petitioners was adequate, if not excessive.

Respectfully submitted,

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